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ALEXANDER L. STEVAS,
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No. 80-1641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE SUPREME COURT OF VIRGINIA, et al.,

Appellants,

v.

CONSUMERS UNION
OF UNITED STATES, INC., et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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RESPONSE TO MOTION TO DEFER CONSIDERATON OF JURISDICTIONAL STATEMENT

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PARTIES

Consumers Union Foundation, Inc. may be an affiliate of Consumers Union of United States, Inc. and Virginia Citizens Consumer Council Fund, Inc. may be an affiliate of Virginia Citizens Consumer Council under Rule 28.1.

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Consumers Union of United States, Inc. and Virginia Citizens Consumer Council (herein referred to as "Consumer Groups") respectfully request this Court to deny appellants' Motion to Defer Consideration of Jurisdictional Statement or, alternatively, to delay consideration of the motion until it receives appellees' motion to dismiss.

The jurisdictional questions raised by appellants should be decided forthwith so that their appeal may proceed efficiently in the proper forum. Questions concerning the reach and exclusivity of this Court's jurisdiction, having been raised in this court, are more appropriately decided herein rather than by a lower tribunal. Delaying their resolution will only prolong the proceedings in this litigation which already spans more than six years with three appeals and three cross-appeals to this Court.

These jurisdictional issues, having already been decided by this Court, can be resolved promptly. This Court concluded in *Supreme Court of Virginia v. Consumers Union* that it does not have jurisdiction under 28 U.S.C. Section 1253 over an appeal solely from a fee award: "we would not have appellate jurisdiction under 28 U.S.C. Section 1253 to decide the attorney's fees questions had it alone been appealed." 446 U.S. 719, 737 n.16 (1980). Appellants thus erroneously claim Section 1253 as a basis for jurisdiction over this appeal solely from the fee award.

Similarly, their allegation that jurisdiction arises because the fee award contravenes this Court's mandate is patently erroneous. This Court never ordered the District Court not to award attorneys' fees against the appellants based on their enforcement role. Quite to the contrary, this Court explicitly sanctioned the fee award granted in this case. It vacated an earlier fee award that was premised on legislative acts for which the appellants enjoyed legislative immunity. It then stated "nor would we disagree with the fee award had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role." 446 U.S. at 739.

On remand, the District Court awarded fees based on the appellants' direct enforcement role. *Consumers Union v. American Bar Association,* N. 785-0105-R (E.D.Va.

1981) (Jurisdictional Statement at 1a). The Consumer Groups had sought an injunction enjoining the appellants from enforcing the unconstitutional rule in order to assure maximum attorney participation in the directory and to protect fully the Consumer Groups' first amendment rights. That injunction was granted by the District Court in *Consumers Union v. American Bar Association,* 470 F. Supp. 1055 (E.D.Va. 1979) and upheld by this Court in *Supreme Court of Virginia v. Consumers Union,* 446 U. S. 719 (1980). Thus, the District Court held, "it seems clear that in the circumstances of this case, a sufficiently concrete dispute is . . . made out against the Virginia Court as an enforcer, 48 U.S.L.W. at 4624, n.15, not only for amenability to suit, but also for the purpose of a fee award to Consumers, the prevailing party." *Consumers Union v. American Bar Association, supra,* at 3a. That exercise of discretion, having been approved by this Court, certainly does not contravene this Court's mandate or establish jurisdiction under its mandamus authorities. *Ex Parte Fahey,* 332 U.S. 258 (1947); *Roche v. Evaporated Milk Association,* 319 U.S. 21 (1943).

Accordingly, this Court should decide the issues pertaining to its jurisdiction without delay so that this litigation may proceed efficiently to its final resolution.

Respectfully submitted,

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